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No. 188

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

JAMES C. DAVIS, FEDERAL AGENT, ET AL,
Petitioners,

vs.

MRS. MARY PRESTON, ADMINISTRATRIX,
Respondent.

BRIEF FOR RESPONDENT.

BY

ROBERT L. COLE,
JAS. W. WAYMAN,
Attorneys for Respondent.

THE AMERICAN PRINTING COMPANY, GALVESTON, TEXAS

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JAMES C. DAVIS, FEDERAL AGENT, ET AL
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AS TO THE ISSUE OF PROXIMATE CAUSE.

For convenience, petitioners will be referred to as defendant and respondent as plaintiff.

Three courts have passed on the point here presented. The case was tried before Hon. J. D. Harvey, who has since been elevated to the Commission of Appeals of Texas. The judgment of the trial court was affirmed by the Court of Civil Appeals, the opinion being reported as Davis, Agent, v. Preston, 264 S. W. 331. The opinion of the Supreme Court is in 16 S. W. (2) 117.

Since the opinions of the Court of Civil Appeals and the Supreme Court show the facts rather fully, we will not again restate the evidence except so much of it as may be found necessary in answering defendant's brief.

In the Court of Civil Appeals defendant conceded and the court found that it was a negligent act to have left the rails on the switch yard. It is, in effect, conceded here that this was negligence.

Plaintiff made out her case by taking and introducing in evidence the depositions of Moore (R. 40-50), McCloud (R. 50-55) and McDaniel (R. 55-58), members of the switching crew. Moore also testified in person as a defense witness (R. 60-71). McDaniel was also called to testify in person (R. 71-74).

In defendant's brief it is sought to have the inference drawn that "there was some doubt as to whether it was a heel print." To support this contention isolated extracts are copied from the evidence of McCloud, McDaniel, Quarles and Morris. Plaintiff respectfully submits that when the evidence as a whole is considered the fair inference to be drawn is not only that it was a fresh heel print, but was such as would have been made by a switchman in alighting from a moving train. There is a great deal of evidence in the record as to the heel or foot print, its location and appearance. When Moore's deposition was taken by plaintiff in 1919 (R. 67) he testified:

> "I found a heel print there but I could not swear it was Preston's. From looking at it, *it looked like it had just been made.* The rain falling that night would not have wiped out an impression that deep down even thought it had been made sometime before, water going into the print, you know."

While McDaniel testified at the trial that "I could not swear it was a heel print," when he testified by deposition shortly after the accident he said:

> "I saw a foot print with the others there that night close to the McKinney Street crossing on the left hand

side of the track, I judge possibly three or four feet from the McKinney Street crossing. There were two rails between the two tracks that night, they were between the two main line tracks. I don't know how far it would be from the line of the coach to where the rails were, but about the middle of the track, not over 18 inches of the outside. The end of the rail next to McKinney Avenue was, I suppose, about four feet from the McKinney Avenue crossing. We found what looked like, somewhat like a heel print there in the shell; *it seemed to be fresh.* I don't know, but it was about eighteen or twenty inches I guess, something like, from the end of those loose rails. . . .

"This foot print in the shell was in the usual and customary place for the long field men to get off the train going down there; it was just about the right place to get off on a paved street there." (R 56-57)

Just after Preston's hat and lantern were found the witnesses examined and discussed the heel print among themselves. On this point defense witness Morris said:

"My attention was called to a mark in the shell in the course of the discussion about Preston's death, between the two main line tracks. I could not tell definitely how long it had been made, I could tell nothing more than you could see a heel mark there and it looked to be fresh and *we supposed it to be the heel mark where he lit; that was the supposition. They all thought it was where Mr. Preston got off of the coach.* I don't think there was anybody saw that man get off. . . . It was usual for the end man to get off there. I could not say there was any peculiarity about that heel mark that would have prevented it from being made by some one else; the only thing about the track was, *it looked fresh;* I probably wouldn't know the difference between that and one made a half hour before; I don't suppose I could define any difference between such a mark and one made an hour before." (R 78)

Other evidence on this point is set out in the Court of Civil Appeals' opinion. The evidence was adequate to establish not only that it was a fresh heel print, but one deep enough and such as would have been made by a switchman alighting from a moving train.

In defendant's brief extracts are copied from the testimony of Moore and Quarles from which it is sought to have the inference drawn that the heel print might have been made by some one other than Preston. It could not have been made by one walking along McKinney Avenue, because it was according to some of the witness twelve to twenty feet off of the planking or pavement of McKinney (R 79) and was parallel with the outbound main track which crosses McKinney (R 67). It was a stormy night, with the rain falling; the heel print was fresh; and was in ordinary mudshell ballast. Preston got off at this particular place only a few minutes before it was found. If the heel print had been made any considerable time before the accident, it would not have had the appearance of being fresh under the weather conditions that prevailed. The hat and lantern were found opposite the heel print and about the same distance from McKinney Street (R 79). It is surmise to say that some one else made this fresh heel print. It does not appear that anyone else was along there immediately before Preston fell.

In defendant's brief he says it is noticeable that Preston's body was found not on the left side of the track on which the train was moving but on the right hand side thereof, making reference to Moore's evidence, pages 61 and 62. While Moore did say the body, when found, was closer to the right rail on the outbound main, McCloud said it was in the middle of the track (R 52). The body was dragged several hundred feet and struck on the Milby Street crossing (R 52). In defendant's brief it is sought to have

the inference drawn from Moore's evidence that Preston might have gotten off on the right side of the train. When Moore's deposition was taken shortly after the accident, he said Preston got off on the left side (R 43). McCloud testified by deposition:

> "As near as I remember, on that particular night we got off from the left hand side; Preston did too. The vestibule would be open on that side, too. My impression is he got off. That is the side on which I looked for tracks that night." (R 54) . . . . "The left side is where it is customary for a man to get off." (R 55)

McDaniel, on this point, testified:

> "Preston was a long field man. When we got to McKinney Street crossing it was his duty to protect the cars and the track in shoving the train through. They generally get off there at McKinney Avenue and see that they don't catch nobody on the crossing. He got on what we call the north side, I suppose, of the train when we left the Union Station; that was the left side going out. The vestibule was open where we got on. I never noticed whether all the vestibules were open, I got on at the head end and walked through. Preston must have got off at the McKinney Street crossing on the left hand side next to the rip side, because he was going to shove off on the rip track. That would have been the usual and customary place to get off. I know he got on there at the Union Station, on that side. I don't know which way they went in. I got on the first coach, second class car, I don't know whether he got on the hind end or next to the hind end. That is the side they let passengers out, the platform side. Those vestibules would naturally be open, the others would be closed. In going out I was next to the rear coach. Preston was in the same coach with me." (R 55-56)

In defendant's brief it is said "there is some confusion as to where" the hat and lantern were found. The fair inference from the whole evidence is that the hat was found opposite the place where the heel print was located and approximately the same distance from McKinney Street. The excerpts defendant has quoted from Moore's evidence on this point are of no moment because he did not know where they were found. There are other witnesses, however, who did know the facts. McDaniel deposed that he saw them pick up the lantern and that it was across the inbound main line and about ten or fifteen feet from McKinney Street crossing (R 56). The watchman who picked up the hat, he says, "brought it over to us across the main line. He came from the main line clear across the track," meaning the inbound main, which was the track adjacent to the outbound on which the coach was when he fell (R 56).

The witness Quarles, who picked up the hat, said:

> "When I picked up the hat I was not thinking about anything, you know, and I just thought his hat had blowed off and I am not clear on just where I found the hat unless it was between the tracks of the inbound main, but I think, the best that I can remember is, in between the tracks of the inbound main; that is the best I can recall . . . I was riding on the rear car; I got off of the rear end; I walked towards McKinney Avenue, right towards the watchman's shanty; it was in going there I picked up this man's hat; the best I can recall it was between the inbound main." (R 75)

Defendant, in his brief, based on Moore's evidence, seeks to have the inference drawn that Preston, in the line of his duties that night, should have gotten off some 110 feet beyond McKinney Avenue in order to make a car coupling. The preponderance of the evidence is that he did not get off of the train for that purpose, but in order to flag or protect the McKinney crossing when these coaches had been

backed on the rip track where they were to be stored. The evidence is that they slowed up for the McKinney Street crossing so he could get off at the place to perform this duty, rather than to make a coupling. In any event, the evidence clearly established the fact that he did get off, not 110 feet from McKinney, but at the place where his hat and lantern were found.

The case was submitted to the jury on special issues. The jury found that defendant negligently left the loose rails on which Preston stumbled; that he did not assume the risk and that it was not an inevitable accident; that his death was not caused by the force of the wind; or by the vestibule door falling against him, causing him to lose his balance; or by the fact that the handhold on the car was wet, causing him to slip and fall; or that he did slip on the wet boards of the McKinney Street crossing; or that his having on a raincoat, coupled with the fact that a gale was blowing toward the train on the side from which he attempted to alight; or the fact that he had on gloves, coupled with the further facts that the handhold from which he was alighting was wet, and that a strong gale was blowing toward the train, causing him to slip his hold and lose his balance; or by the rain, causing him to slip, coupled with the fact that a violent wind, in gusts, was blowing towards the side of the train from which he attempted to alight; or that his raincoat caught on some part of the vestibule door or other part of the coach from which he was alighting. (R 23-32)

ARGUMENT.

Could a jury reasonably conclude from the facts that Preston met his death from tripping over one of the loose rails? If reasonable men could differ as to whether this was a proximate cause, the evidence is sufficient. Kreigh

v. Westinghouse & Co., 214 U. S. 249, 53L, Ed. 984; Baltimore & Ohio R. R. v. Griffith, 159 U. S. 603; Cartwright, et al, v. Canode, 106 Tex 502, 171 S. W. 696. In determining this question the testimony must be viewed in its most favorable aspect to plaintiff. Myers v. Pittsburgh Coal Co., 233 U. S. 184, 58 L. Ed. 906.

When the evidence is considered in its most favorable aspect, it is fairly deducible that Preston got off of the moving coach on the left hand side, where the steel rails had been negligently placed, and that he was caused to fall at the point where one of the rails was located. It is clear, too, that the rail, located a foot or two from the coach steps, was something reasonably calculated to trip a switchman getting off of a moving train on a stormy night.

Did he trip on the rail? The train crew that night, after the hat and lantern were picked up, found a fresh, deep, heel print about a step from the end of the rail. This was a few minutes after he was killed. Following the finding of the heel print there was discussion of that circumstance, and Morris, defendant's witness, says, "We supposed it to be the heel mark where he lit," and, further, "they all thought it was where Preston got off." This discussion was had and this conclusion reached by experienced switchmen at the time and while they were trying to determine why Preston was caused to fall. It was a part of the res gestae. It was the only explanation of the accident that was considered by the train crew that night.

The train had slowed down for him to get off at or about the point where the hat and lantern were found, and which was the usual and customary place for the long field man to alight. The fact that his hat and lantern were found so soon after the accident, located just opposite the end of the rail, is, without considering the heel print, enough to show that he fell at that point. The heel print, however, taken

in connection with the location of the hat and lantern, show that he tripped against the rail. All of these facts are consistent with each other and with the fact that he did trip on the rail. Taken together they coincide with and account for his death. They lead to a reasonable and satisfactory conclusion.

Plaintiff did not have to show that Preston's stepping on the rail was the sole and only cause of his death, but only that it was a co-operating cause. A case is made if she has shown that one of the causes of her husband's death was this act of negligence. The rule is stated with clearness by Mr. La Batt in his work on "Master and Servant":

> "When several causes concur to produce certain results, any of them may be termed 'proximate,' provided it appears to have been an efficient cause. The general rule applicable to all cases illustrating this situation, except those in which the contributory negligence of the servant himself is involved (see Sec. 1577, ante), is that, in order to establish the right of action, it is merely necessary to show that one of the co-operating causes of the injury was a culpable act or omission for which the master was responsible. This rule holds good whether the other causes were also defaults for which he was responsible, or were due to some event or some conditions for which he was not required to answer." Vol. 4, p. 4784.

This doctrine has been applied and the liability of the master affirmed where his negligence has concurred in causing injury to the servant with the following agencies: (a) Negligence of a fellow servant. La Batt, Section 1581; (b) Negligence or wrongful act of some third person. La Batt, Section 1580; (c) Negligence of an independent contractor; (d) A risk assumed by the servant; (e) acts of God or inevitable accidents. These cases illustrate the application of the rule that where the negligence of the master

has concurred with some other agency for the operation of which he is not responsible in causing the injury to the servant, the master is liable. It may be that Preston was handling himself with difficulty at the time on account of the slippery steps, the high wind, the long raincoat, wet hand holds, etc. It is probable that a switchman would be more likely to stumble on a rail like that in question on a dark, rainy night than he would on a clear day, but this only makes more culpable the negligence in leaving the rail where it was, because on such a night switchmen need more protection than at ordinary times. It makes no difference in determining the liability of the master whether these other causes were defaults for which he was responsible or not. It is enough if defendant's negligence has concurred in causing Preston's death with any one of the agencies that it is urged might have also had something to do with his stumbling and falling. Being an experienced switchman, the presumption is indulged that he exercised ordinary care for his own safety at all times. If he did not, it was necessary for defendant to allege and prove some act of contributory negligence. None was alleged, none was proven, and none, we submit, can be presumed; but, on the other hand, the affirmative presumption will be indulged that he at all times exercised ordinary care for his own safety.

The Court of Civil Appeals made an apt summary when it said:

> "Therefore it may be conceded that all the facts in evidence surrounding the death of Preston were contributing causes to his death, if the evidence raises a reasonable probability that the rail constituted one of the contributing causes, the jury's verdict must be sustained. And what is there against that inference? Preston fell under the cars. He alighted from the coach at a place, and under circumstances, to show he

might have tripped over a rail. The heel mark shows he was bodily near the rail. In stumbling over an obstacle, it seems to us more reasonable that he would have dropped his lantern than if he had been driven under the coach by the wind. An inference that he stumbled over the rail does violence to no fact in the case, but is in complete harmony with all other facts. In indulging that inference, the jury could have given due weight to the fact that it was raining, that the wind was blowing, that the deceased had on a long raincoat, that the hand holds were wet, etc., but to find that one of these causes was the sole and exclusive proximate cause of the death of Preston would require the jury to discard all evidence in regard to the rail, and to minimize the location of the heel track, and the hat and lantern. A verdict in harmony with all the facts seems to us more reasonable than one in harmony with a portion of the facts, and against other facts."

If plaintiff has produced evidence from which it may be reasonably inferred that the death of her husband proximately resulted from the negligence of defendant, then she has sufficiently explained the cause of the accident. Her case will not be condemned merely because she has failed to exclude every other hypothesis. To hold that plaintiff was required to exclude the probability that the accident might have occurred in some other way would impose on her the burden of establishing her case beyond a reasonable doubt. She is only required to establish it by the preponderance of the evidence. Boch v. Fellman Dry Goods Co., 212 S. W. 635 (Tex. Sup.); Lunde v. Packing Co., 117 N. W. 1068; Ry. v. Wood, 72 Pac. 215; Settle v. Ry., 48 Am. St. Rep. 635; Burk v. Ry., 109 Pac. 1087.

Chicago M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, relied on by defendant, is not in point. Stating it shortly, all plaintiff showed in that case was that Coogan was killed, presumably while attempting to couple the air hose in a train at a point where the railroad had negligently permitted an air pipe along the track to remain bent. It was held

that the mere fact of his being killed under the circumstances did not show that his foot was caught under the bent pipe, and, further, that the mere presence upon the counter of his shoe of a mark discovered several days after the accident with nothing to show when or how it was made and with no care to preserve the shoe in the same condition as it was when the accident occurred did not supply the hiatus in the proofs. That is a case where circumstancial evidence was relied on with a failure to prove adequate circumstances by direct evidence; the jury was permitted to go beyond the field of probabilities and enter the realm of conjecture.

In the case at bar the circumstances upon which the inference is drawn that Preston tripped on the rail are established by direct evidence. It is established by direct evidence that he got off of a moving train at the point where the rail was located. The train slowed down at McKinney Street when he left the coach and he was seen to pass out of the coach for the purpose of getting off at that place (R 42-43). It is established by direct evidence that he did alight at that place and fall, because his hat and lantern were found at that point. It is established by direct evidence that a fresh, deep heel print was made at that point in the shell ballast such as a switchman would make in alighting from a moving train. It is established by direct evidence that this heel print was in such close proximity to the end of the rail as to cause him to trip over the rail when he took the next step. It is established by direct evidence that he was caused to fall under the train from the fact that pieces of his clothing were found along the track. When we consider the number, the independence and the consistency of these component circumstances established by direct evidence, they have adequate probative force to establish the one inference that he tripped on the rail. We respectfully submit that circumstances of no greater probative force were held

adequate in Myers v. Pittsburgh Coal Co. and New York Central Ry. v. Capinsky, cited and relied on by the Supreme Court of Texas. The general principles applicable to the case at bar are illustrated and elucidated by the following analogous cases, in each of which jury verdicts on circumstancial evidence were upheld:

Myers v. Pittsburgh Coal Co., 233 U. S. 184, 34 Sup. Ct. 539, 58 L. Ed. 906, reversing 203 Fed. 221;

Union Pacific Railroad Company v. Huxoll, 245 U. S. 535, 62 L. Ed. 455, 38 Sup. Ct. 187;

Gray v. Davis (CCA 1st) 294 Fed. 58;

Taber v. Davis (CCA 2nd) 280 Fed. 612;

New York Central Railroad Co. v. Capinski, 249 Fed. 346 (CCA);

Fordham v. Gouverneur Village, 160 N. Y. 541, 55 N. E. 290;

Settle v. Ry., 48 Am. St. Rep. 635.

A jury, in a civil case, is within its province as long as it seeks the truth within the field of the evidence to the utmost boundaries of reason which rational men of common sense might set. It is prohibited from passing beyond the line which separates the field of probabilities from the realm of conjecture.

AS TO THE ISSUE OF ABATEMENT.

Preston was killed on September 15, 1919. Five months later (February 26, 1920) suit was filed against Walker D. Hines as Director General of Railroads (R 2). The summons or citation was duly served the next day (R 7). The suit was, therefore, commenced while the Federal Control Act of August 26, 1916, was in effect, and, that being

Leap Year, three days before the Transportation Act of 1920 took effect on March 1, 1920. On May 31, 1922, an order was made granting the right to substitute Jas. C. Davis, Federal Agent, as defendant in the place of Walker D. Hines (R 10) pursuant to which, on November 27, 1922, an amended petition was filed in which Jas. C. Davis was named as defendant (R 12).

The suit having been properly commenced against the Director General of Railroads three days before the termination of Federal control, the following provision of the Transportation Act of 1920 applies:

> "Sec. 206 (d)—Actions, suits, proceedings and reparation claims, of the character above described, pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a)."

With slight change, this is now U. S. Code, Title 49, Sec. 74 (d).

When this Act took effect on March 1, 1920, many litigants, like plaintiff, believed that substitution of the Federal Agent for the Director General in such pending suits might be made at any time because it will be noted the Act does not provide that the substitution should be made within any given period. In any event, it was not generally believed that the Act of February 8, 1899, had application to suits pending, whether brought by or against the Director General, until Payne v. Industrial Board, 258 U. S. 613, 66 L. Ed. 790, was decided on May 1, 1922. This per curiam opinion dismissing a petition for certiorari for want of jurisdiction has been generally construed as holding that the Act of February 8, 1899, had application to suits that had been brought against the Director General. As a re-

sult of this decision many suits would have abated, since the Director General had cases in behalf of the Government and there were many like the case at bar pending against the Director General in which substitutions had not been made within a year as provided in the Act of February 8, 1899. Congress was appealed to and in order to relieve the situation, on March 3, 1923, passed the Winslow Act as an amendment to the Transportation Act of 1920. This Act is now, with slight change, U. S. Code, Title 49, Section 74 (h. i.).

The purpose of the Winslow Act was to repeal the enactment of February 8, 1899, insofar as it affected suits brought by or against the Director General or Federal Agents and in lieu thereof to prescribe a different method and time in which to make substitutions in order to prevent the abatement of suits involving these officials. The Act, in terms, not only validated all substitutions theretofore ordered, without regard to the time when made, but revived all suits that had abated or been dismissed because of the provisions of the Act of 1899. Under the Winslow Act limitation does not run against the right to substitute, except that it must be done before the satisfaction of final judgment. The broad purpose of the statute was to prevent the abatement of suits because of the change of these officials, and the failure to make substitutions within a year. It was a remedial statute designed to prevent a miscarriage of justice through the failure to make a formal substitution that in no way affected the rights or liabilities of litigants. Congress recognized that the mere substitution of a Federal Agent for the Director General, or the substitution of one Federal Agent for another, was a mere matter of form and that the time when it was done was of no importance. It is clear that such agents are only formal representatives of the Government in these suits and do not appear as in

actions of a personal character brought by or against department heads and other officers.

The question presented is, what is meant by the term "properly commenced" as used in the Winslow Act? It is asserted that the action was not properly commenced because under the Federal Employers' Liability Act Mrs. Preston was required to bring her action as administratrix because her husband met his death while engaged as an employee in the furtherance of interstate commerce. Since Preston was a switchman for Houston Belt & Terminal Company, a local Terminal Company, it was thought he was engaged in intrastate commerce. It developed, however, that the particular cars they were switching were a part of an interstate train from Chicago and were being set out at Houston, Texas, because a storm was brewing (R 60). Because of this fact the Employers' Liability Act applied and not the Texas Death Statute, under which Mrs. Preston could have recovered individually. In order to meet this issue that arose during the trial, the court permitted Mrs. Preston in her capacity as administratrix to be substituted as plaintiff, as is required by the Employers' Liability Act.

The decision by this Honorable Court cited in the opinion of the Supreme Court of Texas hold that a new cause of action was not thereby introduced and that the suit was not barred by the statute of limitations because of this substitution, even though it was made more than two years after Preston's death. In New York C. & H. Ry. Co. v. Kinney, 260 U. S. 340, some 7½ years after the suit was begun plaintiff was allowed to amend and allege that the cause of action arose under the Employers' Liability Act.

It is clear that if all substitutions of the succeeding Federal Agents had been made in due time as they were ap-

pointed, no objection could be raised under the decisions of this court and the Supreme Court of Texas to substituting Mrs. Preston in her representative capacity. This being so, it is untenable to urge that the words "properly commenced" have the effect to prevent the Winslow Act from operating to validate the order substituting the Federal Agent for the Director General. The substitution of the Federal Agent for the Director General, or rather the validation of the lower court's order, by the Winslow Act, applying as it does to the defendant, is neither affected by nor does it affect the decisions in respect to her appearing as administratrix instead of individually. They are separate and distinct matters and are not dependent one on the other. The evil Congress was legislating against in the Winslow Act was the statute of 1899 requiring the substitution of Government Agents within a year. It was not intended to disturb the wholesome doctrine announced in decisions like Reading Co. v. Koons, 271 U. S. 62, 70 L. Ed. 837.

The Winslow Act protects three classes of suits from abating, to-wit, those described in subdivisions (a), (c) and (d) of Section 206 of the Transportation Act. The suit at bar is in Class (d). In providing for the substitution of the Federal Agent at any time before satisfaction of final judgment in these three classes of suits, *"properly commenced within the period of limitation prescribed,"* it meant that they must have been duly and seasonably commenced within the period of limitation. It has reference to the time of commencing suits and to the defendant. In any event, it was not improper for plaintiff, under the circumstances, to commerce her suit as she did, as is aptly pointed out by the Supreme Court of Texas in its opinion.

AS TO THE TWO-YEAR PERIOD OF LIMITATIONS.

Defendant, in his brief, contends that the suit abated by force of the statute of February 8, 1899, before the Wins-

low Act was passed, and that this latter enactment was ineffectual to revive it. The argument is that because the Federal Agent was not substituted for the Director General within the year permitted by the Act of 1899, the cause of action was effectively destroyed and it could not be revived by the Winslow Act. The reasoning is that the Winslow Act can not be given retroactive effect in a cause of action that had abated. Two questions are presented: Did the Act of 1899 have the effect of destroying plaintiff's cause of action before the Winslow Act was passed, and, if so, did Congress have the power to revive it by validating the order of substitution made by the trial court? Both questions were answered, in Dougherty et al v. Payne, Director General, 291 Fed. 60 (CCA Fifth Circuit) where the court held that a failure to have Jas. C. Davis substituted as Agent from March 26, 1921, the date of his appointment, until the date of the motion to dismiss for failure to make him a party, filed on February 23, 1923, worked no abatement of plaintiff's case in view of the Winslow Act, providing for the reinstatement or revivor of suits that had abated or had been dismissed pursuant to the Act of 1899; and in the same case, on the merits (291 Fed. 61) held that the Florida two-year statute of limitations was unavailing where it appeared that the suit, when brought, was not barred, the court using the following apposite language:

> "Moreover, this suit was properly brought against the Director General then in office, and by amendment his successor was substituted. No substitution of the present Agent was made, but the suit was still pending when the Act of March 3, 1923, amending section 206a, was passed. No new cause of action resulted by the mere substitution of one individual for another in the office of Agent or Director General. We are therefore of opinion that the amendment of 1923 did not violate the state statute of liamitations." (Page 62)

But even if the Act of 1899 permitting an abatement had the effect of destroying the cause of action, surely Congress

had the power to revive it insofar as the liability of the Government was concerned.

Danzer & Co. v. Gulf & S. I. R. Co., 268 U. S. 633, 69 L. Ed. 1126, does not control or affect the decision of the case at bar for two reasons: (a) In that case the cause of action had already been barred by the statute of limitations before the suit was commenced and before the Transportation Act, Sec. 206 (f), was passed, while in the case at bar the suit was filed five months after Preston's death and was pending when the Winslow Act was passed; and (b) that was a suit between private citizens while in the case at bar the Congress merely validated an order substituting one Federal Agent for another and which affects only the liability of the United States. Surely Congress was authorized to revive a suit against the Government, even if it had abated.

Wherefore, plaintiff prays that the judgment be affirmed.

Respectfully submitted,

ROBERT L. COLE,
JAS. W. WAYMAN,
Attorneys for Respondent.